92-642

Supreme Court, U.S.
FILED
OCT 13 1992
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No.

United States Supreme Court

October Term, 1992

MELVILLE G. ADKINS, SR., ALLAN LEIGH CURTIN, ROBERT L. FALLIN, CLARENCE A. HAWKINS, ROBERT K. HOOKER, ROBERT M. GRIFFITH, HARRY L. MCKINZIE, ROGER L. NESTER, RONNIE D. NEWSOME, LEMUEL D. SCHLUMBOHM, REVEREND CASSELL WARD, AND JAMES R. YOUNG,
Petitioners,

v.

SAFEWAY, INC.
and
MILK DRIVERS AND DAIRY EMPLOYEES UNION LOCAL NO. 246, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the District of Columbia Circuit erroneously, and in conflict with the United States Courts of Appeal for the Ninth, Sixth, and Second Circuits, dismissed the appeals of twelve of thirteen appellants on the ground that Plaintiffs' Joint Notice Of Appeal did not satisfy the requirement of Fed. R. App. P. 3(c) that a notice "designate[ ], however inartfully" the appellants, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988), where, (1) the text of the notice stated, "plaintiffs respectfully notice their appeal"; (2) in normal usage of the language, it is clear from the body of the notice that all of the plaintiffs were seeking to appeal; and (3) the list of docket entries submitted to the court of appeals together with the notice of appeal made clear the identity of each plaintiff.

LISTING OF PARTIES

Rule 14.1 (b) Statement: The names of all parties to this petition appear in the caption of the case. Safeway, Inc. was formerly named Safeway Stores, Inc. Pursuant to the motion of Safeway, Inc. and an order of the court of appeals dated April 24, 1992, the caption was changed to reflect a change in Safeway's corporate name.

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No.

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Petitioners,

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JOINT PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS AND OPINIONS BY OTHER COURTS

Memorandum Opinion And Order Of District Judge Royce C. Lamberth, dated June 21, 1991, granting summary judgment to defendants and dismissing plaintiffs' claims.

Order of the United States Court of Appeals for the District of Columbia Circuit, dated April 20, 1992, dismissing appeals

of Melville G. Adkins, Sr., Allan Leigh Curtin, Robert L. Fallin, Clarence A. Hawkins, Robert K. Hooker, Robert M. Griffith, Harry L. McKinzie, Roger L. Nester, Ronnie D. Newsome, Lemuel D. Schlumbohm, Reverend Cassel Ward, and James R. Young.

968 F.2d 1317: Opinion of the United States Court of Appeals for the District of Columbia, dated July 10, 1992, in support of order dated April 20, 1992.

Order of the Court of Appeals for the District of Columbia, dated July 16, 1992, denying petition for rehearing.

Order of the Court of Appeals for the District of Columbia, dated July 16, 1992, denying suggestion for rehearing *en banc*.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 2101 and Rule 13.4 of the Rules of this Court, this petition is timely filed within ninety days of the order dated July 16, 1992, by which the court of appeals denied the petition for rehearing of the April 20, 1992 order dismissing the appeals of twelve of thirteen plaintiffs.

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction, by writ of certiorari, to review orders of the United States Court of Appeals for the District of Columbia Circuit.

STATUTES AND COURT RULES INVOLVED IN THE CASE

28 U.S.C. § 2107: Time for appeal to court of appeals

In pertinent part:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order, or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

Fed. R. App. P. 3: Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Contents of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgement, order or part thereof appeal from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Fed. R. App. P. 4(a)(1): Appeal as of Right—When Taken

(a) Appeals in Civil Cases

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30

days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Fed. R. Civ. P. 10(a) Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

STATEMENT OF THE CASE

On November 7, 1989, thirteen individual plaintiffs[1] filed a complaint in the United States District Court for the District of Columbia alleging that their employer, respondent Safeway Stores, Inc. ("Safeway"), and their union, respondent Local 246, Teamsters ("the Union"), engaged in age discrimination by reducing the pay of older employees while raising the pay of younger employees. Plaintiffs claimed, *inter alia*, that defendants violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

In accordance with Fed. R. Civ. P. 10(a), the caption of the complaint, "include[d] the names of all the parties." As that rule allows,[2] all subsequent pleadings abbreviated the caption to the names of the first plaintiff and the first defendant.

Defendants moved for summary judgment as a matter of law on all claims. Plaintiffs moved for partial summary judgment on liability under their "disparate impact" theory of violation, reserving for trial their "disparate treatment" claims.

Throughout the proceedings, the plaintiffs, the defendants, and the district judge referred to "plaintiffs" without naming them. With the exception of the complaint, every pleading, brief, and memorandum, and every order of the district court, referred to the thirteen complaining individuals as "plaintiffs".

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[1] The thirteen are the twelve petitioners herein and Donald Leroy Adkins.

[2] Rule 10(a) of the Federal Rules of Civil Procedure states:

> In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Fed. R. Civ. P. 10(a).

By Memorandum of Decision dated June 21, 1991; A. 11,[3] the district court granted summary judgment to defendants on the merits and dismissed the plaintiffs' claims in the entirety. In its Memorandum of Decision, the district court referred to "plaintiffs" but named none of them. The district court entered judgment in favor of defendants and against "plaintiffs".

On July 19, 1991, plaintiffs timely filed in the district court their "Plaintiffs' Joint Notice Of Appeal" ("Plaintiffs' Joint Notice"). A. 21. The text of the Joint Notice stated:

> Pursuant to Rule 3 of the Federal Rules of Appellate Procedure, plaintiffs respectfully notice their appeal to the United States Court of Appeals for the District of Columbia Circuit from the Memorandum Opinion And Order filed in this action on June 21, 1991.

The caption of Plaintiffs' Joint Notice identified "Donald Leroy Adkins, et al., Plaintiffs."

As Rule 3(d) of the Federal Rules of Appellate Procedure requires, the district court transmitted a copy of Plaintiffs' Joint Notice together with the list of docket entries to the clerk of the court of appeals. The list of docket entries states the name of each of the thirteen plaintiffs, and shows clearly that no plaintiff was deleted from or added to the action. A. 23-25.

On October 15 and 21, 1991, Safeway and the Union, respectively, moved the court of appeals to dismiss the appeals on the ground that Plaintiffs' Joint Notice failed to satisfy the requirement of Rule 3(c) of the Federal Rules of Appellate Procedure that a "notice of appeal shall specify the party or parties taking the appeal ..."

By Order dated April 20, 1992, a motions panel of the court of appeals dismissed the appeals of all appellants except Donald Leroy Adkins (the name in the caption on the notice), relying

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[3] The designation "A." refers to the Appendix.

chiefly upon *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (*"Torres"*). The motions panel deferred to the merits panel consideration of whether Plaintiffs' Joint Notice effectively noticed the appeal of Donald Leroy Adkins. A. 1.

On May 19, 1992, the dismissed appellants timely filed a petition for rehearing and suggestion for rehearing *en banc*.

On July 10, 1992, the court of appeals, by the same panel, issued an opinion in support of its order of April 20, 1992. 968 F.2d 1317; A. 3. By order dated July 16, 1992, the court of appeals denied the petition for rehearing. A. 8. By a separate order of the same date, the court denied the suggestion for rehearing *en banc*. A. 10.

ARGUMENT

The Court should grant a writ of certiorari for the following reasons:

1. The ruling below is contrary to *Torres* and the plain meaning of Fed. R. App. P. 3(c), and thereby calls for exercise of this Court's power of supervision.

2. The ruling below conflicts with rulings of the United States Courts of Appeal for the Ninth, Sixth, and Second Circuits as to an important matter of federal law.

I. THE RULING BELOW IS CONTRARY TO *TORRES* AND CONTRARY TO THE PLAIN MEANING OF FED. R. APP. P. 3(c)

Torres and its limits are correctly understood in light of the plain meaning of Rule 3(c) of the Federal Rules of Appellate Procedure and the facts of the case. Rule 3(c) requires that a notice of appeal "*specify* the party or parties taking the appeal," and "*name* the court to which the appeal is taken." *Fed. R. App. P.* 3(c) (emphasis added).[4]

[4] Rules of statutory construction dictate that Rule 3(c) does not require that the notice "name" appellants. If the drafters intended a naming require-

Accordingly, as the Court concluded in *Torres*, the question is one of "fair notice of the specific individual[s] ... seeking to appeal." 487 U.S. at 318.[5] "The specificity requirement of Rule 3(c) is met by "designat[ion]", however inartfully," *id.* at 317, "that gives fair notice of the specific individual or entity seeking to appeal," *id.* at 318.[6]

In *Torres*, the body of the notice of appeal expressly named fifteen of the sixteen plaintiffs, but omitted Torres. The Court held that Torres failed to appeal because the notice manifestly excluded him. By omitting Torres from the list of appellants,

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ment, they would have used the word "name" rather than the word "specify", as they did when they required that the notice "name" the court to which the appeal is taken. By using different words — "specify" and "name" — within the same sentence of Rule (3)(c), the drafters intended different requirements. *Cf. Fed. R. Civ. P. 10(a)* (complaint shall "include the names of all the parties").

[5] As the Court subsequently concluded, "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Smith v. Barry*, ___ U.S. ___at ___, 112 S.Ct. 678, 682 (1992).

[6] In light of this notice function, Rule 3(c) is to be liberally construed. The 1979 amendment to Rule 3(c) states: *"[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c)* (emphasis added).

The Notes of the Advisory Committee explain:

> Because . . . [a] timely filing of the notice of appeal has been characterized as jurisdictional . . . it is important that the right to appeal not be lost by mistakes of mere form. . . . *[S]o long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with.* . . .

Notes of Advisory Committee, Note to Subdivision (c) (citations omitted, emphasis added).

This language deserves more than lipservice. As the Court recently confirmed, "[c]ourts will liberally construe the requirements of Rule 3." *Smith v. Barry*, ___ U.S. at __, 112 S.Ct. at 681, citing *Torres*.

the notice communicated that Torres did *not* appeal. For Torres, the notice of appeal failed to provide "the function of notice". *Smith v. Barry*, ___ U.S. ___, ___, 112 S.Ct. at 682

In the instant case, the court of appeals wrongly concluded in its order of April 20, 1992, that "[*Torres*] requires that the name of each and every appealing party appear on the face of the notice of appeal." A. 1. In its opinion of July 10, 1992, however, the motions panel conceded that "failure to name each appealing party in the notice of appeal is not necessarily fatal: the question is one of 'fair notice ...' ." 968 F.2d at 1319; A. 6.

Having framed the issue correctly at least in its opinion (if not in the order), the court drew an erroneous conclusion. Plaintiffs' Joint Notice states, "plaintiffs respectfully notice their appeal". The plain, ordinary, and only fair meaning of this statement is that all plaintiffs appeal. Any person reading the notice knows that if all of the plaintiffs were not appealing, the notice would have identified by name those who were appealing (as appeared to be the case in *Torres*) or those who were not.

The court of appeals received not only "fair notice" that all of the plaintiffs appealed, but received simultaneous notice of the name of each plaintiff. Pursuant to Rule 3(d) of the Federal Rules of Appellate Procedure, at the instant the court of appeals received Plaintiffs' Joint Notice, it also received the list of docket entries which, without ambiguity, showed the precise identity of the thirteen plaintiffs and that no plaintiff had been added or deleted. A. 23-25.

Plaintiffs' Joint Notice is not susceptible to the ambiguity the court of appeals claims. The "harsh result in this case" that it recognizes is unnecessary and is not "compelled by the logic of *Torres*." 968 F.2d at 1319; A. 7. Supervision by this Court is essential to reinstate the appellate rights of all of the plaintiffs. As discussed in the next section, several circuits disagree with the court of appeals.

II. THE DISMISSALS CONFLICT WITH RULINGS OF THE UNITED STATES COURTS OF APPEAL FOR THE NINTH, SIXTH, AND SECOND CIRCUITS AS TO AN IMPORTANT MATTER OF FEDERAL LAW

Contrary to the instant case, but consistent with *Torres*, the Ninth Circuit Court of Appeals (the same court which ruled that Torres had failed to appeal) holds:

> *Torres* does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them.

National Center For Immigrants' Rights, Inc. v. I.N.S., 892 F.2d. 814, 816 (9th Cir. 1989).

In *National Center*, the notice of appeal was identical in all material respects to Plaintiffs' Joint Notice. The caption of the notice was, "National Center for Immigration and Naturalization Service, et al. Defendants." The body stated, "Notice is hereby given that the defendants in the above-referenced action hereby appeal...." *Id.* at 815. The Ninth Circuit found it, "sufficiently clear from the body of the notice that *all* of the defendants are seeking to appeal." *Id.* at 817 (emphasis supplied). The court's reasoning applies directly to the instant case:

> Defendants in its normal usage, means all defendants not just some. Had only *some* defendants intended to appeal, the proper term to be used in the body of the notice would have been "certain defendants." Alternatively, if only some defendants desired to appeal those defendants could have identified themselves individually.

Id.

The Ninth Circuit stands consistently by this sound reasoning. In *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991), the court upheld a notice that read: "Come now plaintiffs, as consolidated into this cause and do hereby appeal the judgment of this court ... " The court ruled that this language met the Rule 3(c) specificity requirement, reasoning:

> In *Torres*, one party in a multiparty suit was missing from the notice of appeal due to a clerical error. Under that circumstance, there was no reason for opposing counsel to believe the unnamed party would be a party to the appeal. By contrast, appellants in this case accurately listed the parties to the appeal by describing them as all plaintiffs consolidated below. *There was no need for appellants to list each party individually, since appellees could have covered (sic) their identities by referring to records of the lower court proceedings.*

Id. at 1323 (emphasis added). *See Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990) (Because, "*Torres* does not require that the individual names of the appealing parties be listed where a generic term, such as 'defendants,' adequately identifies them," government designation of "defendants" sufficed).

The Sixth Circuit Court of Appeals agrees on virtually identical facts. In *Adkins v. United Mine Workers of America*, 941 F.2d 392 (6th Cir. 1991) *(en banc), cert. denied*, ___ U.S. ___, 112 S.Ct. 1180 (1992), the notice of appeal specified, "Clarence M. Adkins, et al." in the caption, and in the body stated, "Notice is hereby given that all of the Plaintiffs to this action ... appeal..." *Id.* at 396. The court took jurisdiction over the appeals.

The *Adkins* court was mindful of its recent and seemingly contrary opinion in *Minority Employees of Tenn. Dep't of Employment Sec., Inc. v. State of Tennessee*, 901 F.2d 1327 (6th Cir. 1990) *(en banc), cert. denied*, ___ U.S. ___, 111 S.Ct. 210

(1990). ("*Minority Employees*"), and limited that decision to its peculiar facts. In *Minority Employees*, a nearly evenly divided court rejected a "plaintiffs ... appeal" notice except as to the named "Minority Employees". The unanimous *Adkins* court distinguished *Minority Employees* on the ground that the Minority Employees entity was a group, and that the reference in the notice of appeal to "plaintiffs" could be understood to refer to that group and not necessarily to include the additional individual plaintiffs. The *Adkins* court stated, "[n]owhere in the caption or body of the notice of appeal in *Minority Employees* was there an indication that more than one appellant, the group, was seeking to appeal." 941 F.2d at 397.[7]

Adkins applies to the instant case, not *Minority Employees*. Here, no party is a group. The plaintiff identified in the caption and every other plaintiff is an individual. The statement "plaintiffs respectfully notice their appeal" unambiguously refers to all plaintiffs.

The Second Circuit Court of Appeals agrees with the Ninth and Sixth circuits. In *Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir. 1990), the court upheld a notice of appeal by "all the plaintiffs in this action." It reasoned, "no doubt was left that all of the plaintiffs sought review, that all would be entitled to whatever general relief the appellate court might grant, or that all could be held liable for costs or other sanctions on the appeal." *Id.* at 877. With equal force, this reasoning applies to Plaintiffs' Joint Notice. *See also Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1021 n.1 (2d Cir. 1989).[8]

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[7] The court below relied expressly upon *Minority Employees*. 968 F.2d at 1319; A. 6.

[8] The court of appeals below relied upon *Shatah v. Shearson/American Express*, 873 F.2d 550, 552 (2d Cir. 1989) (per curiam), in which the Second Circuit dismissed, as to unnamed plaintiffs, a notice of appeal that merely specified some of the parties with the designation "et al." *Baylis*, not *Shatah*, applies to the facts here.

Other circuit courts of appeal disagree, creating a clear conflict. In *Marin-Piazza v. Aponte-Rogue*, 873 F.2d 432, 432-33 (1st Cir. 1988), the court rejected a notice that stated, "the codefendants in this action appeal", and permitted the appeal only of the appellant named in the caption. The author of the opinion, Judge Coffin, disagreed with this result. He stated:

> the codefendants ... refers to a precise group of five persons. In my view, this is sufficient to meet the holding in *Torres* requiring "*some designation* that gives fair notice of the specific individuals seeking to appeal." [*Torres*,] 108 S.Ct. at 2409 (emphasis added).

Id. at 433 n.1.[9] In *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314 (1st Cir. 1989), the First Circuit also rejected a notice containing the statement "plaintiffs ... appeal".

In agreement with the First Circuit, in *Laidley v. McLain*, 914 F.2d 1386, 1388-89 (10th Cir. 1990), the Tenth Circuit Court of Appeals rejected a notice stating that "plaintiffs ... appeal". The court stated, "[w]e agree with those courts that have found that the designation of unnamed appellants simply as 'plaintiffs' does not meet the standard of Rule 3(c)."[10]

The court of appeals below also relied upon *Cotton v. United States Pipe & Foundry Co.*, 856 F.2d 158, 161 (11th Cir. 1988), in which two named plaintiffs noted an appeal on behalf of themselves and a class. Because the class action had been settled and no class existed when the notice of appeal was filed, the court understandably construed the notice as excluding other individual plaintiffs. This cases teaches nothing about the validity of Plaintiffs' Joint Notice.

[9] Judge Coffin noted that there was no "inconsistency in the record or briefs ... to cast doubt on the precise identity of the putative appellants." 873 F.2d at 433 n.1. Likewise, the record permits no doubt as to the identities of all plaintiffs here.

[10] The court relied upon *Minority Employees* and *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 317.

The conflict in the circuits has arisen because some courts, as in this case, expanded the reasoning of *Torres* to add a gloss to Rule 3(c) that designation by parties rather than names is defective. The impact of this overreaching is needless deprivation of appellate rights even when litigants fairly relied upon plain language in the rule requiring specification but not naming. Judicial administration would be served well if the Court were to grant a writ of certiorari and resolve the conflict.

CONCLUSION

For the foregoing reasons, the Court should grant this joint petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 13, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arnold B. Podgorsky, an attorney for plaintiffs, certify that on this 13th day of October, 1992, copies of the foregoing Joint Petition For Writ Of Certiorari were served by first class mail, postage prepaid, upon the following counsel:

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_____
Arnold B. Podgorsky

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1991

No. 91-7136

Donald Leroy Adkins, et al.,

Appellants,

v.

Safeway Stores, Incorporated, et al.

Filed April 20, 1992
Constance L. Dupre, Clerk
89cv03054

BEFORE: Wald, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of the motions to dismiss, the response thereto, and the replies, it is

ORDERED that the motions to dismiss be granted as to all appellants except Donald Leroy Adkins. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), requires that the name of each and every appealing party appear on the face of the notice of appeal. *See Laidley v. McClain*, 914 F.2d 1386, 1389 (10th Cir. 1990) and cases cited therein (designation of unnamed appellants simply as "plaintiffs" does not meet the standard of

Rule 3(c)); *Minority Employees of Tenn. Dept. of Employment Sec., Inc. v. Tennessee*, 901 F.2d 1327 (6th Cir. 1990) (en banc) (term 'et al.' is insufficient to designate appealing parties in a notice of appeal: notice of appeal must include the name of each and every party taking the appeal). Adkins' attempts to amend the defective notice of appeal were untimely and inadequate. *See Torres*, 487 U.S. at 317 (appealing party may "seek leave to amend the notice of appeal within the time limits set by Rule 4"); *Chennareddy v. Bowsher*, 935 F.2d 315, 318 n.2 (D.C. Cir. 1991) (identifying appealing parties in docketing statement is not adequate). Thus, the appeal is dismissed as to those parties not named in the notice of appeal.

The question whether this court has jurisdiction to consider Adkins' appeal because his name appears in the caption of the notice of appeal is hereby referred to the merits panel to which this appeal is assigned. *Compare Pride v. Venango River Corp.*, 916 F.2d 1250, 1253 (7th Cir. 1990) ("naming a party in the caption of the notice of appeal . . . will not satisfy the specificity requirements of Rule 3(c)") *with United States v. Schneider*, 926 F.2d 777, 779 (8th Cir. 1991) (notice of appeal filed in the name of "Wilbert Schneider, et al." brought the appeal of Schneider before the court); *Laidley*, 914 F.2d at 1390 (court has jurisdiction over the appeal of the party named in the caption of the notice of appeal); *Minority Employees*, 901 F.2d at 1335 (corporate plaintiff was properly before the court where it was named in the caption of the notice of appeal). The parties are directed to include in their briefs the arguments raised in the motions to dismiss rather than incorporate those arguments by reference.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

Donald Leroy ADKINS
et al., Appellants,

v.

SAFEWAY STORES INC. and Milk Drivers and Dairy Employees Union Local No. 246, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellees.

No. 91-7136

United States Court of Appeals
District of Columbia Circuit.

July 10, 1992.

Appeal was taken from order of the United States District Court for the District of Columbia, Royce C. Lamberth, J., which granted motions to dismiss truck drivers' complaint that collective bargaining agreement discriminated against them on basis of age. The Court of Appeals, D.H. Ginsburg, Circuit Judge, held that the use of terms "et al." in caption of notice of appeal and "plaintiffs" in body of notice or appeal did not satisfy the requirement that each and every party appealing be either "named or otherwise designated * * * in the notice of appeal."

Appeal dismissed.

1. Federal Courts 666

Use of terms "et al." in caption of notice of appeal and "plaintiffs" in body of notice of appeal did not satisfy requirement that each and every party appealing be either "named or otherwise designated * * * in the notice of appeal." F.R.A.P.Rule 3(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 666

Appellant may be "otherwise designated" in notice of appeal, for purposes of rule governing contents of notice of appeal, so long as there is not ambiguity as to his or her identity. F.R.A.P.Rule 3(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions, and definitions.

On Motions to Dismiss.

Arnold B. Podgorsky and Barry S. Spector, Washington, D.C., were on the opposition to the motions to dismiss, for appellants.

Richard C. Hotvedt, Washington, D.C., was on the motion to dismiss for appellee Safeway Stores, Inc.

John R. Mooney and Marilyn L. Baker, Washington, D.C., were on the motion to dismiss, for appellee Local No. 246.

Before WALD, D.H. GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge D,H. GINSBURG.

D.H. GINSBURG, Circuit Judge:

Donald Adkins and twelve other dairy truck drivers brought this suit against Safeway Stores, Inc. and the Milk Drivers and Dairy Employees Union Local No. 246, alleging that the collective bargaining agreement between Safeway and the Union discriminates against them on the basis of age. The district court granted the defendants' motion to dismiss, and counsel for the drivers filed a notice of appeal. The notice was filed on behalf of "Donald Leroy Adkins, et al, Plaintiffs" and stated that the "plaintiffs respectfully notice their appeal." Nowhere in the notice were the other drivers specifically identified as appellants.

[1] The appellees move to dismiss the appeal as to all plaintiffs on the ground that the court lacks jurisdiction because the notice fails to identify the specific individuals seeking to appeal, as required by Federal Rule of Appellate Procedure 3(c). We resolve today only the question whether this court has jurisdiction to consider the appeal of the unnamed drivers; the question of our jurisdiction to consider the appeal of Adkins, whose name appears in the caption of the notice of appeal, has been referred to another panel, as have the merits of his appeal.

Rule 3(c) requires that a notice of appeal "specify the party or parties taking the appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 108 S.Ct.2405, 101 L.Ed.2d 285 (1988), the notice of appeal identified as appellants fifteen of the sixteen plaintiffs, *"et al."* Torres, the only unnamed plaintiff, argued that the omission of his name from the notice of appeal was harmless error and that the use of *"et al."* was sufficient to indicate his intention to appeal. 487 U.S. at 317, 108 S.Ct. at 2408-09. The Supreme Court disagreed, stating that the use of the term *"et al"* does not satisfy Rule 3(c) because it does not provide "fair notice of the specific individual ... seeking to appeal." *Id* at 318, 108 S.Ct. at 2409. The Court, noting that Rule 3(c) is jurisdictional in nature, said: "The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Id* at, 314, 515-16, 108 S.Ct. at 2407, 2408.

As the drivers correctly point out, however, in the end the Court did not in *Torres* engraft upon Rule 3(c) a requirement that each appellant be named. All that *Torres* requires is that the appellants be "named or otherwise designated, however inartfully, in the notice of appeal." *Id* at 317, 108 S.Ct. at 2409. Thus, the drivers claim that the term *"et al."* in the caption, in conjunction with a reference to "plaintiffs" in the body of a notice of appeal, is sufficient to satisfy the specificity require-

ment of Rule 3(c), because the generic term "plaintiffs" should be understood to mean "all plaintiffs."

[2] We agree with the drivers' general point that failure to name each appealing party in the notice of appeal is not necessarily fatal: the question is one of "fair notice of the specific individual[s] ... seeking to appeal." *Torres*, 487 U.S. at 318, 108 S.Ct. at 2409. Thus, an appellant may be "otherwise designated" so long as there is no ambiguity as to his or her identity. In *Milanovich v. Costa Crociere, S.p.A.*, 938 F.2d 297, 298 (D.C. Cir.1991), for example, we held that because, *"et ux."* could refer only to the named appellant's wife, it was sufficient to designate her as an appellant. *Cf. Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1192 (D.C. Cir.1991) ("several circuits have ... taken jurisdiction over appeals noticed only by the class representative, *'et al.'*").

Here, however, drivers were not "otherwise designated" in any manner that gave the appellees and this court "fair notice of the specific individual[s] ... seeking to appeal." *Torres*, 487 U.S. at 318, 108 S.Ct. at 2409. if the term *'et al.'* was insufficient to provide such notice in *Torres*, where there was only one unnamed plaintiff to whom it might refer, then it is surely insufficient here, where *'et al.'* could refer to any one or more of the twelve unnamed drivers. Use of the generic term "plaintiffs" does not add specificity because, contrary to the drivers' suggestion, that term dose not necessarily mean "all plaintiffs." We conclude, as have five of the six other circuits to pass upon the question, that the use of the terms *"et al."* and "plaintiffs" dose not satisfy the requirement of rule 3(c), as interpreted in *Torres*, that each and every party appealing be either "named or otherwise designated ... in the notice of appeal." *See Laidley v. McClain*, 914 F.2d 1386, 1389 (10th Cir.1990); *Minority Employees of Tenn. Dept of Employment Sec., Inc. v. Tennessee*, 901 F.2d 1327, 1330 (6th Cir.1990) (en banc); *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 317 (1st Cir.1989)

(en banc); *Shatah v. Shearson/American Express*, 873 F.2d 550, 552 (2d Cir.1989) (per curiam); *Cotton v. United States Pipe & Foundry Co.*, 856 F.2d 158, 161 (11th Cir.1988). *But see Montes v. Thornburgh*, 919 F.2d 531, 534 n. 3 (9th Cir.1990).

We recognize, as did the Supreme Court in *Torres*, that our decision "leads to a harsh result in this case." 487 U.S. at 318, 108 S.Ct. at 2409. Here it is the result compelled by the logic of *Torres* Accordingly, as to all appellants except Donald Adkins, the motions to dismiss are

GRANTED.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1991

No. 91-7136

Donald Leroy Adkins,

Appellant,

v.

Safeway, Incorporated, et al.

Appellees.

Filed July 16, 1992
Constance L. Dupre, Clerk
89cv03054

BEFORE: Wald, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied. The petition does not raise any issues not already considered and resolved by the court in granting the motions to dismiss as to all appellants except Donald Leroy Adkins. *See Adkins v. Safeway Stores. Inc.*, No. 91-7136 (D.C. Cir. July 10, 1992).

Per Curiam

FOR THE COURT:
Constance L. Dupre, Clerk

By: _____
Robert Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1991

No. 91-7136

Donald Leroy Adkins,

Appellants,

v.

Safeway, Inc. et al.

Filed July 16, 1992
Constance L. Dupre, Clerk
CA 89-03054

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Constance L. Dupre, Clerk

BY
Robert A. Bonner
Deputy Clerk

United States District Court

FOR THE DISTRICT OF COLUMBIA

DONALD LEROY ADKINS, et al,

Plaintiffs,

v.

SAFEWAY STORES and MILK DRIVERS AND DAIRY EMPLOYEES UNION, Local No. 246,

Defendants.

Civil Action No. 89-3054
(RCL)

Filed June 21, 1991
Clerk, U.S. District Court
District of Columbia

MEMORANDUM OPINION AND ORDER

This case comes before the court on Defendant Milk Drivers And Dairy Employees Local 246 Motion To Dismiss ("Union's Motion"), Defendant Safeway's Motion To Dismiss Or, In The Alternative, For Summary Judgment ("Safeway's Motion"), Plaintiffs' Motion For Summary Judgment On Age Discrimination Liability ("Plaintiffs' Motion"), and the oppositions, replies, and supplements to those motions. Plaintiffs claim that the defendants violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 (1985), by executing the 1989 collective bargaining agreement with the provision eliminating the commission system for plaintiffs. Plaintiffs also

claim that the Union breached its duty of fair representation by agreeing to the provision eliminating commissions. Upon consideration of the arguments and authorities presented by the parties, and for the reasons set forth below, the court will grant Safeway's Motion, grant the Union's Motion, and deny Plaintiffs' Motion.

I. FACTS[1]

Safeway is a national grocery store chain which operates stores in the Washington, D.C. metropolitan area. Safeway maintains a central distribution center in Landover, Maryland, to service its area stores. The Landover facility includes Safeway's dairy production and transportation center, which dispatches trucks to supply local Safeway stores with dairy products. All of the organized production and transportation employees, including twenty-eight dairy drivers, are represented for collective bargaining purposes by the Milk Drivers and Dairy Employees Union Local No. 246 ("Union"). Safeway and the Union bargain for a single collective bargaining agreement which covers all of Safeway's unionized dairy-related employees. Sixteen of Safeway's twenty-eight dairy drivers were hired prior to June 8, 1969 ("pre 1969 drivers"); twelve were hired after that date ("post-1969 drivers"). Plaintiffs in this lawsuit are thirteen of the pre 1969 drivers employed by Safeway.

Before 1969, Safeway paid all dairy drivers an hourly wage as well as commissions. In 1969, Safeway and the Union executed a collective bargaining agreement which maintained the same wage and commission provisions for dairy drivers hired

[1] The facts set forth in this opinion are undisputed and are derived from: Safeway's Statement of Material Facts As To Which No Genuine Dispute Exists ("Safeway's Statement of Facts"); plaintiffs' Statement Of Undisputed Facts Material To Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiff's Statement of Undisputed Facts"); the Union's Statement Of Material Facts, and Safeway's Counter-Statement Of Facts.

before June 8, 1969, but reduced earnable commissions for dairy drivers hired after June 7, 1969. In collective bargaining negotiations between 1969 and 1989, Safeway continually tried to eliminate the commission arrangement. The 1976 collective bargaining agreement provided that all dairy drivers hired after its effective date would be paid solely on an hourly basis. In the 1984 agreement, the parties agreed to eliminate the commissions entirely, except for the pre 1969 drivers.

The 1989 collective bargaining agreement between Safeway and the Union ended the commission arrangement. Under this agreement, each pre-1969 dairy driver would receive the same hourly wage as post-1969 drivers plus a transitional bonus for the first year of the agreement equal to two-thirds of the difference between his 1988 compensation (including commissions) and his 1989 compensation (based solely on hourly wage). In the second year of this agreement, each pre-1969 driver would receive the same hourly wage as post-1969 drivers plus a transitional bonus of one-third the difference between his 1989 and 1990 compensation. By the third year of the 1989 collective bargaining agreement, all dairy drivers would receive the same hourly wage with no commissions, regardless of when they were hired.

The 1989 collective bargaining agreement provided a $40,000 early retirement option for some pre-1969 drivers. None of the plaintiffs accepted this option. The 1989 agreement also increased the hourly wage rate for all dairy drivers but left unchanged all other perquisites based on seniority, such as vacation selection, job and run selection, and weekend/overtime work.

Negotiations on the 1989 collective bargaining agreement began on February 2, 1989. James R. Young and Allan L. Curtin, plaintiffs in this action, were part of the Union's negotiating team. The 1989 collective bargaining agreement was ratified by the Union membership around February 12,

1989, two days after the effective date of the agreement. Plaintiffs began receiving compensation under the agreement for the week ending March 24, 1989, and received payments retroactive to February 11, 1989.

As of the effective date of the 1989 collective bargaining agreement, the ages of the sixteen pre-1969 dairy drivers were as follows:

Hollifield, H.	66	Hooker, R.	61
Young, J.	61	Fallin, R.	59
McKenzie, H.	59	Griffith, R.	58
Howell, L.	58	Ward, C.	57
Adkins, D.	55	Newsome, R.	52
Jumalon, E.	51	Adkins, M.	51
Curtin, A.	49	Hawkins, C.A.	49
Schlumbohm, L.	47	Nester, R.	43

The ages of the post-1969 dairy drivers as of the date of the 1989 agreement were as follows:

Pope, B.	57	Johnson, C.	55
Hawkins, C.D.	48	Peace, A.	47
Jackson, A.	47	Bolden, S.	47
Hylton, B.	45	Black, M.	44
Murray, C.	43	Martin, C.	42
Follin, T.	39	Dellinger, M.	37

II. LEGAL STANDARDS

Because the court has considered matters outside the pleadings, the court will consider this case under Rule 56(c) of the Federal Rules of Civil Procedure, which indicates that summary judgment is appropriate when examination of the record as a whole reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In examining the record, the court views all inferences in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. ANALYSIS

A. Plaintiffs' Breach of Duty of Fair Representation Claim

Plaintiffs' claim against the Union for breaching its duty of fair representation is barred by the six month statute of limitations. Plaintiffs acknowledged that the act for which they are charging the union with breach of its duty of fair representation is that the Union agreed to the provision in the 1989 collective bargaining agreement which eliminated commission payments. This provision became effective around February 12, 1989. Plaintiffs' Statement of Undisputed Facts at ¶ 6. Plaintiffs filed their complaint alleging the Union's breach of duty on November 7, 1989, almost nine months after the Union's alleged wrongful conduct.

In *Del Costello v. International Brotherhood of Teamsters*, the Supreme Court applied the six month limitation period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), to a fair representation claim where an employee sued and employer and the employee's union claiming both a breach of a collective bargaining agreement and the union's duty of fair representation. 462 U.S. 151 (1983). In *Del Costello*, the Court expressly rejected plaintiff's claim that the court should use the state's breach of contract limitations period for the fair representation claim. The Supreme Court reasoned that the § 10(b) limitations period is the statute of limitations period used for unfair labor practices and the breach of duty of fair representation is an unfair labor practice. *Id.* at 170. Under the reasoning set forth in *Del Costello*, this court finds that the six month limitation period of § 10(b) of the National Labor Relations Act for filing unfair labor practice charges is the appropriate limitations period for breach of duty of fair representation claims against the union. Because plaintiffs filed their breach of duty of fair representation claim more than six months after the February 12, 1989, effective date of the collec-

tive bargaining agreement, that claim is time-barred. *See Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083, 1086 (6th Cir. 1984) (following *Del Costello* and dismissing duty of fair representation claim against union where plaintiffs also alleged sex discrimination under Title VII).[2]

Even if plaintiffs' fair representation claim was not time-barred, it would fail because the Union did not breach its duty to plaintiffs. The Supreme Court has stated that a" breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). This court's review of the Union's performance is highly deferential and this court can find a breach of the duty of fair representation only if the terms in the collective bargaining agreement eliminating the commission system are so far beyond the wide range of reasonableness as to be wholly irrational or arbitrary. *Air Line Pilots Assoc. v. O'Neill*, 111 S. Ct. 1127, 1133-35 (1991).

Under the standards just set forth, this court finds that the Union did not breach its duty of fair representation. The 1989 collective bargaining agreement achieved a uniform wage scale for all the Union's dairy drivers. The 1989 collective bargaining agreement recognized that all union dairy drivers performed the same tasks and were to be paid the same wage. Except for

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[2] The court rejects plaintiffs' argument that their duty of fair representation claim is not time-barred because a "continuing violation" exists by virtue of each "discriminatory wage payment." Memorandum of Points and Authorities in Opposition to the Unions Motion at 10. Plaintiffs confuse their ADEA claim with their fair representation claim. Defendants contest the timeliness of the latter, not the former claim. Plaintiffs' fair representation claim challenges the Union's actions in executing the collective bargaining agreement with the provision eliminating commissions. Any alleged breach of the duty of fair representation occurred at the time the 1989 collective bargaining agreement was executed by the union around February 12, 1989, and the limitations period began to run from that date.

eliminating the commission system, the agreement did not eliminate any of the perquisites to which the pre-1969 drivers were entitled due to their seniority at Safeway. In fact, plaintiffs received a bonus, as negotiated by the Union, for the first two years of the 1989 agreement. Given these circumstances, and the responsibility of the Union to bargain for the benefit of all its members, the court cannot find that the provision of the 1989 agreement eliminating the commission system to be arbitrary or irrational.[3]

B. Plaintiffs' Age Discrimination Claim

The ADEA prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). Similarly, the ADEA prohibits a labor organization from discriminating on the basis of age and from causing an employer to discriminate against an individual in violation of § 623. 29 U.S.C. § 623(c). To make out a prima facie case of age discrimination, "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982). If plaintiffs establish a prima facie case, defendants must produce credible evidence showing that the employment decision was made on the basis of a "legitimate nondiscriminatory reason." *Id.* at 857. If the defendants meet this burden, plaintiffs must show by a preponderance of the evidence that the asserted legitimate reason is merely pretextual. *Id.*

In the context of this case, plaintiffs' first obligation is to raise a reasonable inference that age discrimination was a deter-

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[3] The court will address and dismiss plaintiffs' claim of discriminatory Union conduct in Part B below. The reasoning set forth below applies to this court's finding that the Union did not breach its duty of fair representation by acting in a discriminatory manner.

mining factor in the elimination of the commission system for pre-1969 dairy drivers. Reviewing the material facts as to which there is no genuine dispute (as set forth in Part I above), the court finds that plaintiffs have failed even to make a threshold showing that the commission elimination provision of the 1989 collective bargaining agreement discriminates against any protected class. Stated another way, plaintiffs have failed to demonstrate facts to raise an inference that age discrimination was even a factor, much less the determining factor, in the decision to eliminate the commission system.

This Circuit has established that the ADEA protects individuals who range in age from forty to seventy years old. *Id.* at 857. As of the date that the 1989 collective bargaining agreement was executed, all sixteen pre-1969 drivers, including the thirteen plaintiffs, were in the protected age group. However, ten of the twelve post-1969 drivers were also in the protected age group, with the remaining two falling just below the forty year old cutoff. Moreover, nine of the twelve post-1969 drivers were older than the youngest pre-1969 driver, and eight of the pre-1969 drivers were *younger* than the oldest post-1969 drivers.

Almost all dairy drivers being in the protected age group, the court cannot find that defendants discriminated among dairy drivers on the basis of age. Plaintiffs attempt to establish a prima facie case of age discrimination by showing that, as a group, they receive less compensation under the terms of the 1989 collective bargaining agreement than they did under the prior collective bargaining agreement. This court recognizes that a plaintiff can establish a prima facie case of age discrimination where an employer favors younger employees in the forty to seventy year old range over older employees within that range. *See Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985); *Buttell v. American Podiatric Medical Association*, 700 F. Supp. 592, 597 (D.D.C. 1988), *cert. denied* 474 U.S. 1037

(1986). However, the facts in the present case do not permit an inference of age discrimination as a factor leading to the elimination of the commission system. The court rejects plaintiffs' attempt to establish a prima facie case by showing a disparity in the average age of the pre- and post-1969 drivers (54 and 46 years old, respectively). The court believes that plaintiffs' attempt to stress the difference in average age obscures consideration of the actual factual scenario which reveals that the decision to eliminate the commission system had nothing to do with age.

A comparison of the undisputed age of each pre- and post-1969 driver does not permit an inference of discrimination. While the pre-1969 group does have some individuals who are older than any in the post-1969 group, the post-1969 group has many individuals who are the same age or older than numerous individuals in the pre 1969 group. The court finds that the evidence of the differences in respective ages of individuals of the two dairy driver groups is insufficient to permit an inference of discrimination. *Maxfield v. Sinclair International*, 766 F.2d at 793.[4]

For the reasons set forth above, the court finds that plaintiffs' age discrimination claim has no factual support and should therefore be dismissed. Accordingly, for the reasons stated above, it is hereby ORDERED that:

1. Defendant Milk Drivers And Dairy Employees Local 246's Motion To Dismiss is GRANTED and summary judgment is entered for the Union.

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[4] Plaintiffs do not dispute that Safeway sought to eliminate the commission system beginning in the 1960's, *before* any of the plaintiffs were over forty, and during successive bargaining with the Union through the 1970's and 1980's. Safeway's Statement of Facts at ¶¶ 34-36; Affidavit of Michael R. Bull at ¶¶ 4-13. The fact that Safeway repeatedly tried to eliminate the commission system before any plaintiffs were in the ADEA protected age group and continuously since the 1960's provides a further indication that the age of the commission drivers was not a factor in the decision to eliminate the commission system.

2. Defendant Safeway's Motion To Dismiss Or, In The Alternative, For Summary Judgment is GRANTED and summary judgment is entered for defendant Safeway.

3. Plaintiffs' Motion For Summary Judgment On Age Discrimination Liability is DENIED.

It is FURTHER ORDERED that, there being no triable issues remaining, plaintiffs' complaint is DISMISSED WITH PREJUDICE.

SO ORDERED

Royce C. Lamberth
United States District Judge

DATE: JUNE 21, 1991

United States District Court

DISTRICT OF COLUMBIA

DONALD LEROY ADKINS, et al.,

Plaintiffs,

vs.

SAFEWAY STORES, INC., et al.,

Defendants.

Received July 19, 1991
United States District Court
District of Columbia

C. A. No. 89-3054-RCL

PLAINTIFFS' JOINT NOTICE OF APPEAL

Pursuant to Rule 3 of the Federal Rules of Appellate Procedure, plaintiffs respectfully notice their appeal to the United States Court of Appeals for the District of Columbia Circuit from the Memorandum Opinion And Order filed in this action on June 21, 1991.

Dated: July 19, 1991

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arnold B. Podgorsky, certify that on this 19th day of July, 1991, copies of the foregoing Notice of Appeal were served by first class mail, postage prepaid, upon the following counsel:

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Arnold B. Podgorsky

U.S. District Court

USDC DISTRICT OF COLUMBIA (WASHINGTON)

CIVIL DOCKET FOR CASE #: 89-CV-3054

TYPE H APPEAL
JURY

ADKINS, et al v. SAFEWAY STORES, INC., et al
Assigned to: Judge Royce C. Lamberth
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 11/7/89
Jury demand: Plaintiff
Nature of Suit: 442
Jurisdiction: Federal Question

Cause: 29:621 Job Discrimination (Age)
Case type: 1. civil

Donald Leroy Adkins
plaintiff

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Docket as of July 23, 1991 10:30 am

Proceedings include all events. TYPE H APPEAL
1:89cv3054 JURY
ADKINS, et al v. SAFEWAY STORES, INC., et al

Melville G. Adkins, Sr. plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Allan Leigh Curtin plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Robert L. Fallin plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Clarence A. Hawkins, plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Robert K. Hooker plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Robert M. Griffith plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Harry L. Mckinzie plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Roger L. Nester plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Ronnie D. Newsome plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
Emanuel D. Schlumbohm plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]

Docket as of July 23, 1991 10:30 am

Proceedings include all events. TYPE H APPEAL
1:89cv3054 JURY
ADKINS, et al v. SAFEWAY STORES, INC., et al

Cassell Ward, Reverend plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
James R. Young plaintiff	Arnold Bruce Podgorsky (See above) [COR LD NTC]
v.	
Safeway Stores, Incorporated defendant	John Robert Mooney 429-1900 [COR NTC] Beins, Axelrod, Osborne & Mooney 2033 K Street, N.W. Suite 300 Washington, DC 20006 (202) 429-1900 Richard C. Hotvedt 467-7110 [COR LD NTC] Neal David Mollen 467-7082 [COR LD NTC] Neal David Mollen (See above) [COR LD NTC] Morgan, Lewis & Bockius 1800 M Street, N.W. 9th Floor-N Washington, DC 20036 (202) 467-7105

Proceedings include all events. TYPE H APPEAL
1:89cv3054 JURY
ADKINS, et al v. SAFEWAY STORES, INC., et al

Milk Drivers and Dairy Employees Union, Local No. 246, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
defendant

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Neal David Mollen
(See above)
[COR LD NTC]

1/7/89	1	COMPLAINT filed summons issued (2) (yep) [Entry date 11/08/89]
11/27/89	2	MOTION by defendant SAFEWAY STORES, INC., defendant MILK DRIVERS & DAIRY to extend time to 12/8/89 to file responsive pleadings (jda) [Entry date 11/28/89]
11/29/89	3	ORDER by Judge Royce C. Lamberth : granting motion to extend time to 12/8/89 to file responsive pleadings [2-1] by MILK DRIVERS & DAIRY, SAFEWAY STORES, INC., responsive pleadings due by 12/8/89 (N) (mf) [Entry date 12/04/89]
12/8/89	4	ANSWER for defendant SAFEWAY STORES, INC. , (cjp) [Entry date 12/14/89]
12/8/89	5	MOTION by defendant MILK DRIVERS & DAIRY to dismiss; exhibits (3) (cjp) [Entry date 12/14/89]

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12/15/89	6	MOTION by plaintiffs to extend time to 1/15/90 to respond to motion to dismiss (mf) [Entry date 12/18/89]
12/21/89	7	ORDER by Judge Royce C. Lamberth : granting motion to extend time to 1/15/90 to respond to motion to dismiss [6-1] by plaintiffs; response to motion due 1/15/89 (N) (mf) [Entry date 12/27/89]
1/16/90	8	MEMORANDUM by plaintiffs in opposition to motion to dismiss [5-1] by MILK DRIVERS & DAIRY (mf) [Entry date 01/17/90]
1/18/90	9	MOTION (Unopposed) by defendant MILK DRIVERS & DAIRY to extend time to 2/2/90 to file reply brief (jda) [Entry date 01/19/90]
1/22/90	10	ORDER by Judge Royce C. Lamberth : granting motion to extend time to 2/2/90 to file reply brief [9-1] by MILK DRIVERS & DAIRY brief due 2/2/90 ; (N) (mf) [Entry date 01/25/90]
1/25/90	11	MOTION by defendant SAFEWAY STORES, INC. to dismiss, or in the alternative for summary judgment; affidavits (2) (mf)
2/2/90	12	MOTION by plaintiffs to extend time to 3/2/90 to respond to motion to dismiss or summary judgment (mf)
2/2/90	13	REPLY by defendant MILK DRIVERS & DAIRY to response to motion to dismiss [11-1] by SAFEWAY STORES, INC. (mf) [Entry date 02/05/90]

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2/5/90	14	ORDER by Judge Royce C. Lamberth : granting motion to extend time to 3/2/90 to respond to motion to dismiss or summary judgment [12-1] by plaintiffs response to motion due 3/2/90 for JAMES R. YOUNG, for CASSELL WARD, for LEMUEL D. SCHLUMBOHM, for RONNIE D. NEWSOME ; (N) (mf) [Entry date 02/07/90]
3/2/90	15	MOTION by plaintiff for summary judgment on age discrimination liability; declaration (1) (mf) [Entry date 03/05/90]
3/2/90	16	MEMORANDUM by plaintiff in opposition to motion for summary judgment [11-2] by SAFEWAY STORES, INC. (mf) [Entry date 03/05/90]
3/2/90	17	MOTION by plaintiff for leave to file supplemental P&A's in opposition to motion to dismiss; EXHIBIT (Supplemental memorandum) (mf) [Entry date 03/05/90]
3/12/90	18	MOTION by defendant SAFEWAY STORES, INC. to extend time to 4/2/90 to oppose motion for summary judgment (mf) [Entry date 03/13/90]
3/13/90	19	MOTION by defendant MILK DRIVERS & DAIRY to extend time to 4/2/90 to respond to motion for summary judgment (mf) [Entry date 03/14/90]
3/15/90	20	ORDER by Judge Royce C. Lamberth : granting unopposed motion to extend time to 4/2/90 to oppose motion for summary judgment [18-1] by SAFEWAY STORES, INC. reply to dispositive motions due 4/2/90 ; (N) (mf) [Entry date 03/16/90]

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3/15/90	21	ORDER by Judge Royce C. Lamberth : granting motion to extend time to 4/2/90 to respond to motion for summary judgment [19-1] by MILK DRIVERS & DAIRY response in opposition to motion for summary judgment due 4/2/90 (N) (mf) [Entry date 03/16/90]
3/15/90	22	ORDER by Judge Royce C. Lamberth : granting motion for leave to file supplemental P&A's in opposition to motion to dismiss [17-1] by plaintiff (N) (mf) [Entry date 03/19/90]
3/15/90	23	MEMORANDUM (supplement) by plaintiffs in opposition to motion to dismiss [5-1] by MILK DRIVERS & DAIRY (mf) [Entry date 03/19/90]
4/2/90	24	REPLY by defendant SAFEWAY STORES, INC. to response opposition to motion to dismiss or for summary judgment [16-1] by plaintiff; declarations (2) (mf) [Entry date 04/03/90]
4/2/90	25	RESPONSE by defendant MILK DRIVERS & DAIRY in opposition to motion for summary judgment on age discrimination liability [15-1] by plaintiff; affidavit (1) (mf) [Entry date 04/03/90]
4/5/90	26	ERRATA by defendant MILK DRIVERS & DAIRY of Statement of Material Facts filed 4/2/90 (jda) [Entry date 04/06/90]
4/9/90	27	REPLY by plaintiffs to response in opposition to motion for summary judgment on liability [25-1] by MILK DRIVERS & DAIRY, and response [24-1] by SAFEWAY STORES, INC. (mf)

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1/17/91	28	SUPPLEMENTAL MEMORANDUM to authority in support of MILK DRIVERS UNION 246 motion for summary judgment; attachment (1) (mf) [Entry date 01/23/91]
4/8/91	29	MOTION by plaintiff for leave to file supplemental memorandum on summary judgment; EXHIBIT (SUPPLEMENTAL MEMORANDUM) (dot) [Entry date 04/09/91]
4/22/91	30	RESPONSE by defendant SAFEWAY STORES, INC., defendant MILK DRIVERS & DAIRY motion for leave to file supplemental memorandum on summary judgment [29-1] by plaintiff (ajr)
4/30/91	31	MOTION by defendant SAFEWAY STORES, INC. for leave to file supplemental memorandum in support of motion for summary judgment; EXHIBIT (Supplemental Memorandum) (mf) [Entry date 05/01/91]
5/6/91	32	MOTION by defendant MILK DRIVERS & DAIRY for leave to file supplemental memorandum; EXHIBIT (Supplemental Memorandum) (mf) [Entry date 05/07/91]
5/13/91	33	REPLY by plaintiff DONALD LEROY ADKINS, plaintiff MELVILLE G. ADKINS SR., plaintiff ALLAN LEIGH CURTIN, plaintiff ROBERT L. FALLIN, plaintiff CLARENCE A. HAWKINS, plaintiff ROBERT K. HOOKER, plaintiff ROBERT M. GRIFFITH, plaintiff HARRY L. MCKINZIE, plaintiff ROGER L. NESTER, plaintiff RONNIE D. NEWSOME, plaintiff LEMUEL D. SCHLUMBOHM, plaintiff CASSELL WARD, plaintiff JAMES R. YOUNG to response to supplemental memorandum [28-1] (blj) [Entry date 05/14/91]

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6/19/91	35	ORDER by Judge Royce C. Lamberth : granting nunc pro tunc to 4/8/91 motion for leave to file supplemental memorandum of points and authorities on summary judgment [29-1] by plaintiff (N) (ela) [Entry date 06/26/91]
6/19/91	36	SUPPLEMENTAL MEMORANDUM of points and authorities on summary judgment motions by plaintiffs (ela) [Entry date 06/26/91]
6/19/91	37	ORDER by Judge Royce C. Lamberth : granting nunc pro tunc to 4/30/91 motion for leave to file supplemental memorandum in support of motion for summary judgment [31-1] by SAFEWAY STORES, INC. (N) (ela) [Entry date 06/26/91]
6/19/91	38	SUPPLEMENTAL MEMORANDUM OF LAW in support of its motion for summary judgment by defendant SAFEWAY STORES, INC. (ela) [Entry date 06/26/91]
6/19/91	39	ORDER by Judge Royce C. Lamberth : granting nunc pro tunc 5/6/91 the motion for leave to file supplemental memorandum [32-1] by MILK & DAIRY (N) (ela) [Entry date 06/26/91]
6/19/91	40	SUPPLEMENTAL MEMORANDUM to motion for summary judgment and in response to plaintiff's supplemental memorandum by defendant MILK DRIVERS & DAIRY (ela) [Entry date 06/26/91]
6/21/91	34	MEMORANDUM AND ORDER by Judge Royce C. Lamberth : granting motion to dismiss [5-1] by MILK DRIVERS & DAIRY and summary judgment is entered; granting motion to dismiss [11-1] by SAFEWAY STORES, INC., granting motion for

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summary judgment [11-2] by SAFEWAY STORES, INC.; denying motion for summary judgment on age discrimination liability [15-1] by plaintiff; plaintiff's complaint is dismissed with prejudice; (N) (clv)

6/19/91 41 NOTICE OF APPEAL by plaintiff from order [34-1] entered 6/21/91. Docketing fee of $100.00 and Filing fee of $5.00 paid and credited to U.S. Copies mailed to John R. Mooney and Richard C. Hotvedt. (ela) [Entry date 07/23/91]

7/23/91 — TRANSMITTED PRELIMINARY RECORD on appeal [41-1] by plaintiff to U.S. Court of Appeals (ela)